

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

OCT 24 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Respondent,

v.

KIM COOK,

Petitioner.

2 CA-CR 2008-0120-PR
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 111, Rules of
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200201201

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt

Tucson
Attorney for Petitioner

PELANDER, Chief Judge.

¶1 In this petition for review, Kim Cook challenges the trial court's denial of the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless we find the court clearly abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 After being convicted of homicide and sentenced to prison in Alaska, Cook was transferred to a private prison facility in Pinal County from which he attempted to

escape in June 2002. His first trial ended in a hung jury. On retrial in March 2005, a second jury found Cook guilty of second-degree escape in violation of A.R.S. § 13-2503(A). The trial court sentenced him to a presumptive, 1.5-year term of imprisonment, to be served consecutively to the sentence he was already serving. We affirmed the conviction and sentence on appeal. *State v. Cook*, No. 2 CA-CR 2005-0192 (memorandum decision filed Dec. 15, 2006). Cook then filed a notice of and petition for post-conviction relief, alleging ineffective assistance by trial counsel.

¶3 In his petition, Cook complained of having had only “minimal contact” with his lawyer before trial, claiming counsel had not made reasonable efforts to communicate with him or “to establish a reasonable attorney-client relationship.” He claimed counsel had been unprepared for trial and had done nothing to help Cook prepare to testify in his own defense after counsel’s efforts to dissuade him from testifying failed. He faulted counsel for refusing to file six motions Cook had prepared during trial and had asked counsel to submit for him.¹ He further complained that counsel had brought a laptop computer to court so he could work on other cases during trial, “show[ing] that he was not concerned with performing his duty to render effective assistance of counsel [to Cook] through all stages of the proceedings.”²

¹On appeal Cook raised some of the issues covered by his pro se motions, and we ruled they had no merit.

²Cook also complained below that the trial court had “denied [him] his constitutional right to effective assistance of counsel by summarily denying his motion for a new attorney.” Unlike his claim of ineffective assistance of counsel, however, this assertion of legal error by the trial court was an issue Cook could and should have raised on appeal, as the defendant had done in *United States v. Welty*, 674 F.2d 185 (3d Cir. 1982), the authority

¶4 The state responded, arguing that most of Cook’s complaints about counsel’s performance fell within the realm of trial strategy and noting that, because this was a retrial, most of defense counsel’s preparation would already have been done in connection with the first trial. And, as both Cook’s petition and the state’s response illustrated, the issues in the case were not complex. Cook had been found near a chainlink fence in an area of the prison that was expressly off-limits for prisoners. On the ground beside him were two gray uniform shirts, a water bottle, and a book. Among other items in Cook’s possession were nail clippers, a calendar, a two-day supply of prescription medicine, and some toilet paper. After he had been discovered and escorted back into the prison, Cook made statements acknowledging it had been his intention to escape if he could.

¶5 The trial court held an evidentiary hearing, at which Cook and his trial counsel, David Fuller, both testified. The court allowed the parties to file supplemental memoranda following the hearing, after which it ruled in a minute entry order that states, in pertinent part:

The Court FINDS, as follows:

1. That, although there was an apparent discrepancy between trial counsel’s testimony at the evidentiary hearing and the billing later submitted for his services, as regards the number of visits at the incarceration facility and telephone contacts, the issue is w[hether] his services fell below the standard required of counsel, not the number of times he and the Defendant conversed;

Cook cited in support of his contention. Because Cook did not raise the issue on appeal, he is precluded from raising it in a post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3).

2. That the record overall supports the State's assertion that the Defendant received more than adequate representation at the trial herein concerned[,] which was the second trial in this case;
3. That no colorable claim to any other ground for relief has been presented [to] or found by this Court.

¶6 To be entitled to relief on a claim of ineffective assistance of counsel, a petitioner must establish that counsel's performance fell below prevailing professional norms and that the outcome of the case probably would have been different but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). If a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other was satisfied. *State v. Salazar*, 146 Ariz. 540, 543, 707 P.2d 944, 947 (1985).

¶7 Having reviewed the available record, including the transcript of the evidentiary hearing and the parties' post-hearing memoranda, we agree with the trial court that Cook did not meet his burden of demonstrating either that trial counsel's representation was deficient or that counsel's performance changed the outcome of the case. Finding no abuse of the court's discretion in denying post-conviction relief, we grant the petition for review but deny relief.

JOHN PELANDER, Chief Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PHILIP G. ESPINOSA, Judge